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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/297,090	07/09/1999	STEFAN LANGE	REF/970230/L	9256

7590 06/14/2002

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EXAMINER

WANG, SHENGJUN

ART UNIT

PAPER NUMBER

1617

DATE MAILED: 06/14/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Applicant No.</b>	<b>Applicant(s)</b>
	09/297,090	GORANSSON ET AL.
	<b>Examiner</b> Shengjun Wang	<b>Art Unit</b> 1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on 27 December 2001.

2a) This action is FINAL.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 26-41 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 26-41 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

- Certified copies of the priority documents have been received.
- Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
- Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) Notice of References Cited (PTO-892)                    4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)                    5) Notice of Informal Patent Application (PTO-152)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.

6) Other: \_\_\_\_\_.

**DETAILED ACTION**

Receipt of applicants' amendments and remarks submitted December 27, 2001 is acknowledged.

***Claim Rejections 35 U.S.C. 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

2. Claims 26-28, 30 and 31 are rejected under 35 U.S.C. 102(e) as being anticipated by Johnston (U.S. Patent 5,565,225) for reasons set forth in the prior office action.

***Claim Rejections 35 U.S.C. – 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 26-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnston (US 5,565,225) in view of Lange et al. (U.S. 5,296,243) and in further view of Robbins et al. (CAPplus abstract, AN 1972:111657) and Aspinal et al. (Capplus abstract, AN 1956:30292) for reasons set forth in the prior office action.

Claims 26-41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bolles et al. (US 4,834,989) and Camburn (US 5,552,175) in view of Witt et al. (US 4,241,183) for reasons set forth in the prior office action.

Applicants' amendments and remarks submitted December 27, 2001 have been fully considered, they are persuasive with respect to the specification objection and rejection under 35 U.S.C. 112, but are not persuasive for the rejections under 35 U.S.C. 102 and 103 for reasons discussed below.

Applicants traverse the rejection under 35 U.S.C 102 over Johnston on the ground that Johnston particularly teach for treatment of allergy induced diarrhea and the instant claims are generic to all diarrhea. It is noted that a claim is anticipated if any species encompassed by the claim is anticipated.

Applicants mention that "there are great technical problems in preparing food stuff with malt (except beer) in order for them to be palatable or suitable for industrial methods of preparation" It may be true. However, Johnston teaches the employment of foodstuff prepared from malted grain, particularly, malted barley. Instant t claims do not have any limitation with respect to the composition employed in the method which would distinct the composition from prior art.

Applicants traverse the rejection of 103 over Johnston in view of Lange et al. and in further view of Robbins et al. and Aspinall et al. on the ground that Johnston particularly teach for treatment of allergy induced diarrhea and the instant claims are generic to all diarrhea. This argument is not probative as discussed above. Applicants further argue that Aspinall reference and Robins reference do not teach the composition of free amino acids of the malting of the

cereals. The arguments are not persuasive. Particularly, Robins expressly teaches analysis of amino acid in the malted barley. Aspinall teaches that polysaccharide has been digested by enzyme. One of ordinary skill in the art would have reasonably expected the presence of sugar in malted barley.

Applicants assert that the rejection under 35 U.S.C. 103 over Bolles et al. and Camburn in view of Witt et al. is improper because the cited reference do not teach regulating the flux of fluid and electrolytes in the intestine. The assertion is improper. Note the rejection rely on the fact that claimed invention would read on the practice as suggested by the cited prior art, i.e., people consume the foodstuff taught by Bolles reference and Camburn reference. Applicants provide no argument or factual data to distinct the claimed invention from the practice as suggested by the cited prior art, i.e., people consume the foodstuff taught by Bolles reference and Camburn reference. Note the foodstuff of Bolles and Camburn are made from malted cereal and are made for human consumption. As stated in the prior office action *It is well settled patent law that mode of action elucidation does not impart patentable moment to otherwise old and obvious subject matter. Applicant's attention is directed to In re Swinehart, (169 USPQ 226 at 229) where the Court of Customs and Patent Appeals stated "is elementary that the mere recitation of a newly discovered function or property, (regulating the flux of fluid and electrolytes in the intestine) inherently possessed by thing in the prior art, does not cause a claim drawn to those things to distinguish over the prior art."*

5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shengjun Wang, Ph.D. whose telephone number is (703) 308-4554. The examiner can normally be reached on Monday-Friday from 8:30 to 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Minna Moezie, J.D., can be reached on (703) 308-4612. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Examiner



Shengjun Wang

June 10, 2002



RUSSELL TRAVERS  
PRIMARY EXAMINER  
GROUP 1200